# In the United States Circuit Court of Appeals for the Ninth District.

ALASKA NORTHERN RAILWAY CO.,
A Corporation,
Plaintiff in Error,
vs.
MUNICIPALITY OF SEWARD,
Defendant in Error.

No. 2581.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION.

## BRIEF FOR DEFENDANT IN ERROR

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### STATEMENT OF THE CASE

This action was brought by the town of Seward, Alaska, to foreclose its lien for taxes assessed against the real property belonging to the Alaska Northern Railway Company, said property being situated within the corporate limits of the town of Seward.

Plaintiff in error files a protest protesting against the court making the order of adjustment and sale of the property, assigning six grounds of

objection, but in the trial of the cause the first four objections were abandoned, the said plaintiff in error relying solely upon objections five and six, which are:

OBJECTION FIVE

"That the Alaska Northern Railway is exempt from municipal taxes for a period of five years by virtue of the act of Congress approved August 24, 1912, entitled An Act to create a Legislative Assembly in the Territory of Alaska to confer Legislative powers thereon, and for other purposes."

OBJECTION SIX

"That the Alaska Northern Railway Company is further exempt from taxation by virtue of the special act of Congress entitled An Act to extend the time for the completion of the Alaska Central Railway, and for other purposes, approved June 30, 1906."

Plaintiff in error has assigned as error seven exceptions to the ruling of the Court, but upon examination I find that they are all embodied in objections five and six (supra) of the protest filed in the lower Court. Under assignment of error to this Court, it becomes apparent that there is but one proposition for the Court to decide: IS THE PROPERTY BELONGING TO THE ALASKA NORTHERN RAILWAY COMPANY EXEMPT FROM TAXATION BY MUNICIPALITIES?

Plaintiff in error raises two questions, namely:

No. 1 Did the act of Congress, approved August 24, 1912 entitled, An Act to create a Legislative Assembly in the Territory of Alaska to confer legislative power thereon and for other purposes, repeal the act of Congress approved April 28, 1904, which provided for the incorporating of towns and municipalities in Alaska, and defines their power of taxation?

No. 2 Does the Alaska Northern Railway Company, by virtue of its purchase of the Railway and Railway Property formerly owned by the Alaska Central Railroad, succeed to the exemption from taxation granted by Congress to the said Alaska Central Railway Company.

## ARGUMENT.

I will discuss the two propositions in their order.

### No. 1.

It is claimed by plaintiff in error that the property taxed is exempt under the act of Congress approved August 24, 1912, which is entitled:

> "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative powers thereon, and for other purposes, in Alaska."

This act is generally spoken of as the ORGANIC ACT and will be hereinafter referred to as the Organic Act.

That part of the act upon which plaintiff in error relies is that part of section Nine of the act which reads:

> "No tax shall be levied for Territorial purposes in excess of one per centum of the property therein in any one year; nor shall any incorporated town or municipality levy any tax for any purpose in excess of two per centum of the assessed valuation of the property within the town, in any one year: Provided, that the Congress reserves the exclusive power for five years from the date of the approval of this act to fix and impose any tax or taxes upon Railways and Railway property in Alaska."

Plaintiff in error contends that the last clause above quoted, "That the Congress reserves the exclusive power for five years from the date of the approval of this act to fix and impose any tax or taxes upon Railway or Railway property in Alaska" is as binding upon the Common Councils of the Municipalities of Alaska as it is upon the Territorial Legislature thereof.

On the contrary it is the contention of the defendant in error that the said reservation does not apply to the Common Council of the Municipalities, but applies exclusively to the Legislature.

It must be borne in mind that at the time this legislation was passed, Congress was dealing ex-

clusively with the problems of creating a Legislative Assembly for Alaska and defining its powers.

It must be borne in mind that Congress, eight years previous to the passage of the Organic Act, passed the act providing for the incorporating of Municipalities in Alaska, defining their powers and the powers of the Common Councils in such municipalities. This act which was approved April 28, 1904, made special provisions for the taxation of property within the corporate limits of the Municipality, stating just what property should be exempt from taxation.

It must also be borne in mind that Congress in passing the Organic Act nowhere restricted or encroached upon the rights and power previously granted the Municipalities, unless it had done so in this particular clause, dealing with the exemption of Railroads from taxation in Alaska. It is true that immediately preceding the reservation of railways from taxation, there is a clause which provides: "Nor shall any incorporated town or Municipality levy any tax for any purpose in excess of two per centum of the assesed valuation of the property, within the town, in any one year," but it will be observed that the rate of taxation fixed by Congress in the Act of April 28, 1904, creating Municipalities was limited to two per centum of the assessed valuation of the property situated within the corporate limits thereof, it is therefore clear that Congress in

using that language had no intention of restricting any right previously granted the municipality, but to reserve from the legislative body, it was then creating, the authority it would otherwise have had to extend the taxing power of municipalities. Any other construction would render the clause meaningless.

It must also be borne in mind that the law approved April 28th 1904, which enables Municipalities in Alaska to incorporate, is an Act of Congress and is of the same dignity as is the Organic Act. The first acts deals with a legislative assembly for the municipalities of Alaska, defining what property shall be exempt from taxation, the latter act (Organic Act) is dealing with the powers of the Legislature, it was then creating, and has reserved from said legislature the authority of taxing Railway and Railway property.

The Municipalities of Alaska do not look to the Legislature for authority to levy and assess a municipal tax. If the municipalities of Alaska were creatures of the Territorial Legislature an entirely different proposition would be presented; The elementary principle that a creation cannot be greater than its creator would then apply, and the fact that the legislature was prohibited from taxing Railways and Railway property, would also disqualify the legislature from imparting that power to a municipality of its creation, but defendant in error is not in that position, the town of Seward was in exist-

ence with all its powers of taxation, before the Territorial legislature was created. The town was incorporated and derives its power of taxation from the act of Congress approved April 28, 1904, no part of which has the legislature repealed. The only part of the act which concerns this case is that part of Section 627 of the Compiled Laws of Alaska, which reads:

> "The said Common Council shall have and exercise the following powers:
>
> NINTH To assess and collect a general tax for school and municipal purposes not to exceed two per centum of the assessed valuation, upon all real and personal property, and declare the same a lien upon such property and enforce the collection of such lien, by forclosure, levy, distraint, and sale: Providing, however, that all property belonging to the municipality used exclusively for religious, educational and charitable purposes, and the household furniture of the head of a family or a householder, not exceeding two hundred dollars in value, shall be exempt from such taxation: Provided further, that the law exempting certain property from levy and sale on execution shall not apply to said taxes or the collection of the same."

In the opinion rendered in the lower court, the Honorable Judge, after quoting that part of the act

of Congress, approved April 28, 1904, granting the power of taxation to municipalities, made the following comment thereon:

> "This act has never been repealed. Chapter 69 of the Territorial laws of Alaska does not undertake to authorize or empower the levy or collection of any further or additional tax than that theretofore authorized by Congress, but merely provides for the manner of enforcement and collection of the same." (page 38 of transcript).

It is very evident that the exemption from taxation in the law above quoted does not extend to Railways or Railway property, but it is claimed by plantiff in error that the word, "exclusive" as used in the clause in the Organic Act indicates that it was the intent of Congress to restrain the Common Council of Municipalities, as well as the Territorial Legislature, from taxing Railways and Railway property. This contention is not sustained without placing an unwarranted construction on that clause. As previously stated, Congress was creating a territorial legislature and had no thought in the use of the word "exclusive" other than to wholly exclude from said legislature all power of taxing Railways and Railway property. The fact that no reference is made to the previous act, granting to the Common Council of Municipalities the power of taxation is very persuasive evidence that Congress had no thought of taking from the Common Council of Municipalities any powers previously granted.

The use of the word "reserve" indicates that it was not the intent of Congress to take away powers already granted, but to reserve from the legislature, it was then creating, certain rights out of the powers it was then granting.

It is the policy of the courts to sustain the taxing power of the state in every instance where it can be done by a reasonable interpretation of the statute, and this rule applies to municipalities. It will never be presumed that it was the intent of Congress to abridge the taxing power of the municipality when once granted unless such intent is manifest in clear and unmistaken terms:

Yazoo & M. Valley R. Co. v Adams, 180 U. S. 1; City of Rochester v Rochester R. Co. 82 N. Y. 99; 70 L. R. A. 779;

Maine Central R. Co., v State of Maine 96 U. S. 99; 24 Law. Edition 836.

The principle of law seems to be that a statute abridging the right of taxation should receive the narrowest construction which will carry out the intent of the legislature:

Dauphin, etc R. Co., v Kennerly 74 Ala. 589; 37 Cyc. 726;

State vs. Great Northern Ry. Co., 106 Minn 303; 119 N. W. 202;

State of Missouri v Kenebeck and Western R. Co. 6 L. R. A. 222;

Wilson v Gains 103 U. S. 417;
Morgan v Louisiana 93 U· S. 417.

In the case of the Yazoo & M. V. R· Co. v Adams (supra) Justice Brown in delivering the opinion of the court said:

> "Public policy in almost all the states has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational, and municipal purposes, but this list should not be extended except for very substantial reasons; and while, as we have held in many cases, legislatures may, in the interest of the public, contract for the exemption of other property, such contracts should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that the courts are astute to seize upon evidence tending to show either, that such exemptions were not orginally intended, or that they have become inoperative by change in the original constitution of the Companies."

The above is quoted with approval by the N. Y. Courts in the case of City of Rochester v Rochester Ry. Co. 82 N. Y. 99, 70 LRA 779. It was also quoted with approval by the lower court in its opinion rendered in this case, the court prefacing the quotation with these words:

> "It seems to me clear that the purpose and intent of said provision of the Organic Act was merely to prohibit the Territorial Legislature from imposing a further or additional tax on Railroads during said period of five years" (page 39 of Records).

In the case of State of Missouri v Kenebeck & Western R. Co. supra, the court said:

> "It must be kept in mind that exemptions from taxation will not be recognized unless granted in terms too plain to be mistaken."

In view of the rule of strict construction, against all laws tending to curtail or abridge the power of taxation, so tenaciously adhered to by the courts resolving all doubts in favor of the taxing power, it certainly seems that the reservation in the Organic Act can apply only to the Territorial Legislature and that Congress had no thought of repealing or superseding any of the powers it had previously granted to the common councils of municipalities to assess, levy and collect a general tax upon all railway property situated within the coporate limits of the municipality.

No. 2.

Is the exemption from taxation of its Railway and Railway property granted by Congress to the Alaska Central Ry. Co· an appurtenance or franchise which follows the property when transferred

to a third party or was it a personal privilege to the Alaska Central Railway Company.

In order that the Court may get a clear idea of the situation, I will make a brief statement of the facts concerning the history of the Alaska Northern Railway Company, plaintiff in error herein.

The Alaska Central Railway Co. was a foreign corporation incorporated under the laws of the state of Washington. Prior to the year of 1905 said company commenced the construction of a railway from Seward, on Resurrection Bay, in Alaska, the proposed terminal to be somewhere on the Tanana River in Alaska.

An Act of Congress approved June 30, 1906, among other provisions granted to said Alaska Central Railway Co. immunity from taxation on its Railway and Railway property.

During the year 1907 or 1908 said Company became involved in financial difficulties and on October 19, 1909 the property of said Company was sold at marshal's sale to F. G. Jemmett. A short time thereafter the Alaska Northern Railway Co. was incorporated under the laws of the State of Washington to take over the property and said Jemmett transferred the property to said Alaska Northern Railway Co.

Plaintiff in error contends that the immunity from taxation granted by Congress to the Alaska

Central Railway Co. was in the nature of an appurtenance or franchise and passed by transfer from the Alaska Central Railway Co. to Jemmett and from him to the Alaska Northern Railway Co.

Defendant in error contends that the immunity was personal to the Alaska Central Railway Co. and was incapable of being transferred.

It is a well settled principle of law that immunity from taxation granted to a person or corporation is a personal right and not transferable and it is equally as well settled that where the exemption is placed on certain property, describing it without reference to the ownership, that in absence of a substantial consideration therefor flowing to the state, or clear and unmistakable language showing that it was the intent of Congress that the exemption should follow the property into the hands of a third party, such exemption is a personal right to the owner of the property at the time the exemption was granted and is not an appurtenance or franchise capable of being transferred:

Shields v Ohio 95 U· S. 319;
Maine C. R. Co. v Maine 96 U. S.;
Norfolk & W. R. Co. v Pendleton 159 U. S. 667;
Yazoo & M. Valley R. Co. v Adams (supra) 180 U. S. 1;
Morgan v Louisiana (supra) 93 U. S. 217;
Chespeke & Ohio R. Co. v Miller 114 U· S. 176;

Tucker v Ferguson 22 Wall. 527;
City of Rochester Ry. Co. 182 N. Y. 99;
Wilson v Gaines (supra) 103 U. S. 417;

In the case of Wilson v Gaines (supra) Chief Justice Waite in delivering the opinion of the court quoted with approval from the opinion of the court in Morgan v. Louisiana (supra) the following:

> "In Morgan v. Louisiana 93 U. S. 217 we distinctly held that immunity fom taxation was a personal privilege and not transferable except with the consent or under the authority of the legislature which granted the exemption, or some succeeding legislature, and that such exemption does not necessarily attach to or run with the property after it passed from the owner in whose favor the exemption was granted."

In the case of Morgan v Gaines (supra) the exemption was on the property, the language being that the property should be exempt, while in this case the exemption was to the Alaska Central Railway Co. The Act of Congress, approved June 30, 1906, granting the said exemption, is entitled "An Act to Extend the Time for the Completion of the Alaska Central Railway, and for other puropses." The only part of this Act that concerns this case is paragraph five thereof which reads as follows:

> "Fifth: Said Company (referring to Alaska Central Ry. Co.) shall be exempt from license

> tax, and tax on its railway and railway property during the period of construction and for five years thereafter; Providing, that the total period of exemption shall not exceed ten years from the time of the passage of this act."

Could more apt language have been selected to indicate that the exemption was personal and could not extend to property not owned by the Alaska Central Ry· Co. than the words "said Company shall be exempt from license tax and tax on its railway and railway property?"

The wording of the act confines the exemption to the Alaska Central Ry. Co. The act did not exempt the property but simply exempted the company from paying a tax thereon. In other words the language of the act prohibited the municipality from assessing and levying a tax on the railway so long as it was the property of the Alaska Central Ry. Co. and no longer.

Had the act read:

The Alaska Central Railway and Railway property shall be exempt, the contention of the plaintiff in error that the exemption would follow the property, would be more plausible; but under the decisions of the courts above cited the contention of the plaintiff in error would not then be tenable. But the act reading as it does, it would be just as plausible to contend that because Congress

has exempted the household property of the head of a family and householder from taxation by municipalities in Alaska, that as the property becomes exempt in the hands of the householder, the exemption followed the property and was still exempt from taxation when sold to the second hand dealer. In fact in the case of the household property the contention of the second hand dealer would be more plausible, for in his case the law reads that the property shall be exempt from taxation, while in the case of the Alaska Central Ry. Co. the exemption was to the Company and not to the property.

It will also be observed by a careful examination of the act of Congress approved June 30, 1906, above referred to, that it contains many other privileges and benefits granted the Railway Co. without any consideration whatever flowing from the Company to the United States or to the Territory of Alaska in return therefor. There being no consideration for the exemption from taxation and the exemption being personal to the Alaska Central Railway Co., the right was incapable of being tansferred.

In the case of Berryman, et al., v Board of Trustees of Whitman College 222 U. S. 334, the court, in discussing the question of exemptions from taxation and whether such exemptions when granted were transferable, said:

"In other words the question was whether the transmission of the privileges of the corporation to

another embraced the privilege resulting from a contract exemption from taxation. It was held that it did not, upon the theory that a contract exemption from taxation was so exceptional in its nature that the right to transmit it was not embraced in the general authority to transmit privileges, and therefore the power to transfer must be expressly and specifically conferred."

The above being quoted with approval by the Supreme Court of the United States and being the latest expression of the court on that point is certainly decisive, and there being no reference to transferring the exemption from taxation in the act granting the exemption to the Alaska Central Ry. Co., it would certainly seem that the Alaska Northern Ry. Co will have to pay its taxes.

Respectfully submitted,

J. LINDLEY GREEN.

Counsel for Defendant in Error.